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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

STONERIDGE HOMEOWNERS ASSOCIATION et al., Plaintiffs and Appellants, v. SADDLEBACK HOMEOWNERS ASSOCIATION, Defendant and Respondent.	A122436, A122442 (San Francisco County Super. Ct. Nos. CGC-03-417197, CGC-03-417965, & CGC-03-420084)

I. INTRODUCTION

In this consolidated appeal, a plaintiff "downhill" condominium homeowners association (HOA) and numerous individual homeowners therein (hereafter, appellants) appeal from a judgment entered against them in their nuisance suit against the defendant and respondent "uphill" condominium HOA, Saddleback Homeowners Association, (hereafter respondent). In their actions, appellants had alleged that the respondent HOA (and others with whom there were pre-trial settlements) were responsible for a "continuing" nuisance which had resulted in rock and shale falling on and into appellants' property, resulting in property damage and emotional distress. After a bifurcated trial in which the jury made several factual findings which were contrary to appellants' contentions, the court entered judgment in favor of respondent. We affirm that judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

The original plaintiff in this case was and is appellant Stoneridge Homeowners Association (hereafter appellant HOA), the operator of a six-building, 94-unit condominium development which sits on the floor of a former rock quarry on Geneva Avenue in the southern part of San Francisco. The remaining appellants are multiple individual homeowners in that condominium project. Respondent Saddleback Homeowners Association is the condominium homeowners association of a 273-unit condominium project which sits above appellants, relatively close to the edge of the former quarry. The appellants' project was constructed during the early to mid-1990's, and respondent's (apparently from the record before us) during the period 1986-1994.

The quarry involved was mined in the early and mid-1900's, and became very deep, with its walls 160 to 190 feet high in some places. After quarry operations ceased, a bowling alley was placed on the quarry floor, i.e., the location now occupied by the appellants' condominiums.

Even before these projects were constructed, rockslides were apparently a regular occurrence in the area now occupied by appellants' condominiums. For example, the bowling alley owner told one of respondent's developers that the area had experienced rockslides for 20 or 30 years, and a soils engineer told the same developer that "sloughing would occur on a regular basis . . . every year, every other year, fourth year. But it would be continuing."

And as both sides note in their briefs, the property line between the two condominium projects actually crossed the cliff walls at various places; thus, both condominiums owned portions of the steep, cut slope.

In late 2001 and early 2002, rockslides from the face of the quarry wall caused damage to two buildings of appellants' condominiums, namely buildings 4000 and 5000,[1] and forced evacuation of some of those buildings. The residents of building 5000 could

[1] Building 5000 was located within a few feet of the steepest of the walls.

not occupy their units for several months, and had to find alternative living accommodations.

On February 7, 2003, appellant HOA filed a private nuisance action against respondent. The following month and in May 2003, the appellant homeowners in the Stoneridge project brought separate actions against respondent, alleging that respondent had interfered with their property by not preventing the rockslides from the cliff separating (at least roughly speaking) the two properties; those suits also alleged emotional distress. Later, the parties stipulated that the several suits should be consolidated for trial, which the court then ordered.

Appellants' complaints also named the developer of their project, DeAnza Properties, LL&V Limited Partnership, Lawrence Stone, and John Vidovich (hereafter collectively referred to as DeAnza.) DeAnza and respondent thereupon filed cross-claims against each other. Shortly before trial, appellants settled the claims against DeAnza.

During the almost five years between the filing of the lawsuits and the trial, which commenced in February 2008, extensive discovery and other pre-trial litigation took place. Among other things, the parties and the court discussed the order in which the cases, or the issues in them, should be tried. They ultimately agreed that, because of significant statute of limitations issues, pursuant to Code of Civil Procedure section 597 the issue of whether the defects were latent or patent, and the nuisance caused thereby continuing or permanent, should be tried first. And that was the way the case was actually tried.

As a result, much of the early testimony in what the court and the parties termed "phase I" of the trial concerned the history of the rockslides down into what later became appellants' condominiums and property and the proposed solutions therefore. That testimony included, in addition to the matters noted above:

1. Other evidence, including appellant HOA's enabling declaration and by-laws, and the Final Subdivision Plan Report, noting the possibility of "falling rocks from time to time" and restricting landscaping and grading around the base of the cliff, plus similar

comments in those HOA's Board minutes and in warning signs installed around the perimeters of appellants' property.

2. After a rock slide in 1998, the appellants hired engineer Craig Herzog and his company, Herzog Geotechnical Consulting Engineers, to analyze the problems facing them from the cliff wall and recommend solutions. His firm issued an extensive report in March 1998 stating that, unless "massive remedial measures" were taken, there would be continuing rockslides; the measure Herzog specifically recommended, both in his 1998 report and in his testimony at trial "include[ed] extensive tiebacks or rock bolting in conjunction with steel net facing," a plan which he noted would cost millions of dollars. He also noted, however, that if this strategy was too costly, the risk could be reduced, but not eliminated by the installation of a wire rope barrier system.

3. Appellant HOA's board was very concerned with the costs, and did not opt to implement Herzog's 1998 proposal; instead, it installed stanchions and ribbon to "keep cars from parking in front of the slide."

4. As noted above, in late 2001 and early 2002, heavy rains resulted in rockslides which particularly damaged appellants' buildings 4000 and 5000; as a result, some of building 4000 and all of building 5000 were evacuated, not to be reoccupied until several months later. Loose rocks were taken off the quarry walls and removed; a barrier fence similar to that recommended as a less-expensive alternative was installed. In his testimony, Herzog estimated that these fences would have a 95 percent effective rate and opined that they could have largely resisted the effects of the 2001-2002 slides.

5. Herzog then presented an abatement proposal prepared by him in 2007, i.e., after the 2001-2002 rockslides and the year before trial. It differed slightly, but not much, from his 1998 proposal to appellants, in that it proposed two options, i.e., steel rod anchors drilled into the rock and then steel mesh attached to those anchors or, secondly, "shotcrete," i.e., concrete blown onto a steel grid placed across the key parts of the cliff. The projected installation times for these options were, respectively, six and nine months. Another engineer, William Gibson, confirmed Herzog's testimony that his two alternative plans were "the only two I can think of . . . to stabilize and hold the rocks in place." He

testified that he believed any stabilization project should cover the entire cliff wall, "from top to bottom."[2]

6. Gibson testified that, in his opinion, and including what he regarded as a necessary 10 percent increase for contingencies, the two different ways of stabilizing the entire cliff were slightly under $9.9 million for the steel mesh method and approximately $17.5 million for the "shotcrete" method.

7. Three individual appellants testified about the 2001-2002 rockslides and two of those witnesses testified that the slides were continuing to fall, even thereafter.

8. Although not particularly relevant to any issue involved in the appeal, a valuation expert, one Arthur Gimmy, testified as to the relative values of the two condominium projects, setting the value at $42 million for the appellant HOA and $134 million for the respondent.

Immediately after the 2001-2002 rockslides, the Building Inspection Department of the City and County of San Francisco (hereafter CCSF) issued two notices of violation to appellant HOA and, in August of 2002, a third such notice for its failure to scale off the quarry walls and stabilize them. A year later, it issued a fourth such notice to respondent HOA for its failure to submit a building permit application and address a long-term solution to the rockslide problem. Prior to trial, and in the course of an attempted mediation—conducted "under the auspices of the city" per one of appellants' counsel—the parties attempted to address the issues triggered by CCSF's four notices of violation; they were not successful. Later appellants attempted to offer these four CCSF notices into evidence twice during the course of the trial; on both occasions, the trial court denied their motions on the basis of Evidence Code section 352.

Towards the end of the several-week trial, the parties submitted proposed instructions; the trial court rejected two of those proposed by appellants and then

[2] Respondent did not present any contrary expert testimony to that of Messrs. Herzog and Gibson.

instructed the jury. The key portions of the record relevant to appellants' claims of instructional issues will be discussed further *post.*

After the jury had heard all of the relevant testimony regarding phase I of the trial and the court's instructions, the court gave the jury a special verdict form asking it four questions:

"1. Does the condition of the quarry walls behind the Stoneridge Condominiums project constitute a nuisance?

"2. Is the nuisance currently continuing?

"3. Does the impact of the nuisance vary over time?

"4. Is the nuisance complained of by Plaintiffs reasonably abatable according to the proposed plan of abatement offered by Mr. Gibson and Mr. Herzog?"

On March 18, 2008, the jury answered the first three questions in the affirmative, but answered "No" to the fourth and final question. As far as can be determined from the record provided us, the special verdicts were unanimous.

Two days later, the trial reconvened with the jury now absent. Based on the jury's special verdict, the court ruled that the private nuisance which existed on the properties was permanent as defined by the law (to be discussed *post*) and thus ruled that appellants' actions were barred by Code of Civil Procedure section 338, subdivision (b), as the statute of limitations had begun to run, at the latest, on March 25, 1998, when the appellant HOA Board had discussed the Herzog report. It also ruled that the individual emotional distress claims of the individual appellants were barred by Code of Civil Procedure section 335.1.

On March 27, 2008, the court granted respondent's motion to dismiss. On April 17, the court entered an amended judgment in favor of respondent and, on July 8, 2008, denied appellants' motions for judgment notwithstanding the verdict and for a new trial.

Appellants filed a timely notice of appeal.

III. DISCUSSION

A. *Issues to be Reviewed and the Applicable Standards of Review.*

With one significant exception, we think respondent has correctly identified the issues before us.[3] Those issues are, in short, whether: (1) substantial evidence supports the jury's special verdict (and thus the judgment based on it) on appellants' nuisance claim; (2) the court abused its discretion by bifurcating the trial or (3) excluding from evidence notices of violation issued by the City and County of San Francisco (hereafter CCSF) to the respondent HOA or (4) regarding the special verdict form submitted to the jury; (5) the court erred with regard to any of the jury instructions it gave or denied; and (6) the court correctly dismissed appellants' emotional distress damage claim as barred by the applicable statute of limitations, Code of Civil Procedure section 338, subdivision (b) (hereafter section 338(b).)

The standards of review applicable to these issues are clear. With regard to issue No. 1, it is whether substantial evidence supports the jury's verdict that the nuisance was "permanent" and not just "continuing" (as to the legal distinction, see *post*). With regard to issues Nos. 2 and 3, the standard of review is, clearly, whether the trial court abused its discretion in making the relevant rulings regarding trial bifurcation (and later slightly modifying that ruling) and excluding certain evidence proffered to the jury by appellant. (See Eisenberg, et al., Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group 2008) ¶¶ 8:96.4 & 8:96.10 and cases cited therein.) The same standard applies to the

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[3] The exception is that, because of the different applicable standards of review, we choose to deal separately with the issue of the special verdict form approved by the trial court. As we note *post*, that issue is subject to a different standard of review than the instructional issues.

Regarding the number of issues involved in this appeal, we very much decline to follow appellants' suggestions. At the beginning of an introductory paragraph entitled "LEGAL DISCUSSION" in their opening brief, appellants contend they are "entitled to a new trial for the following distinct and compelling reasons," whereupon eight specific reasons are listed. But, in the pages that follow, these eight reasons are reduced to seven, and argued not at all in the order previously summarized. Then, after the respondent listed only five issues for review in its brief, in the "LEGAL DISCUSSION" section of their reply brief, appellants reduce the number of relevant issues to four.

fourth issue, i.e., the propriety of the special verdict form submitted to the jury. (See., e.g., *Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1118; *Red Mountain LLC v. Fallbrook Public Utility Dist.* (2006) 143 Cal.App.4th 333, 364; *Masonite Corp. v. Pacific Gas & Electric Co.* (1976) 65 Cal.App.3d 1, 11.)

The fifth issue noted above, the propriety of the trial court's instructional rulings, is governed by a de novo standard of review. (See *People v. Posey* (2004) 32 Cal.4th 193, 218; *Sander/Moses Productions, Inc. v. NBC Studios, Inc.* (2006) 142 Cal.App.4th 1086, 1094.)

That same standard applies to the sixth and final issue, i.e., an appellate court's review of a trial court's dismissal of a cause of action because of the bar of the statute of limitations when, as here, the pertinent facts are essentially undisputed. (See *Arcadia Development Co. v. City of Morgan Hill* (2008) 169 Cal.App.4th 253, 260-261; *Pugliese v. Superior Court* (2007) 146 Cal.App.4th 1444, 1448.)

B. *There was Substantial Evidence that the Nuisance was not "Reasonably Abatable" and Hence "Permanent.*"

Via its special verdict, the jury found that the nuisance on appellants' downhill property (1) was reasonably apparent to appellant by November 7, 1996, and (2) was not reasonably abatable under appellants' alternative plans. Based on these findings, the trial court ruled that the nuisance could and should be classified as "permanent" and thus appellants' actions were barred by the applicable three-year statute of limitations, i.e., section 338(b).

As discussed above, our standard of review of this issue is whether substantial evidence supported the critical jury findings. It is emphatically *not*, as appellants rather curiously argue, whether "the substantial evidence presented was sufficient to establish the . . . nuisance as continuing." (Initial caps omitted.) To so argue stands the clearly applicable standard of review on its proverbial head.

Before specifying the substantial evidence supportive of the jury's special verdict, it is important to discuss the legal difference between nuisances which are ongoing, i.e., "continuing," and those which have, as of a given point in time, become "permanent."

And, obviously, such is especially true when, as here, we are dealing with a statute of limitations issue.

The leading case dealing with this subject is our Supreme Court's decision in *Baker v. Burbank-Glendale-Pasadena Airport Authority* (1985) 39 Cal.3d 862, where the court laid down these governing principles: "Two distinct classifications have emerged in nuisance law which determine the remedies available to injured parties and the applicable statute of limitations. On the one hand, permanent nuisances are of a type where ' "by one act a permanent injury is done, [and] damages are assessed once for all." ' [Citations.] The cases finding the nuisance complained of to be unquestionably permanent in nature have involved solid structures, such as a building encroaching upon the plaintiff's land [citation], a steam railroad operating over plaintiff's land [citation], or regrade of a street for a rail system [citation]. In such cases, plaintiffs ordinarily are required to bring one action for all past, present and future damage within three years after the permanent nuisance is erected. [Citations.] The statutory period is shorter for claims against public entities. (Gov. Code, § 911.2.) Damages are not dependent upon any subsequent use of the property but are complete when the nuisance comes into existence. [Citation.] [¶] On the other hand, if a nuisance is a use which may be discontinued at any time, it is considered continuing in character and persons harmed by it may bring successive actions for damages until the nuisance is abated. [Citation.] Recovery is limited, however, to actual injury suffered prior to commencement of each action. Prospective damages are unavailable. [¶] The classic example of a continuing nuisance is an ongoing or repeated disturbance, such as the one before us today, caused by noise, vibration or foul odor. [Citation.] Indeed, even more substantial physical invasions of land have been held to be continuing in character. [Citation.] As emphasized in *Tracy*, the distinction to be drawn is between encroachments of a permanent nature erected upon one's lands, and a complaint made, not of the location of the offending structures, but of the continuing use of such structures. [Citation.] The former are permanent, the latter is not." (*Baker, supra*, 39 Cal.3d at pp. 868-869, fns. omitted (*Baker*); see also our Supreme Court's earlier, albeit much briefer, articulation of

these basic principles in *Spaulding v. Cameron* (1952) 38 Cal.2d 265, 267-268 (*Spaulding*).)[4]

These principles have been consistently applied by both our Supreme Court and our sister courts since. (See, e.g., *Mangini v. Aerojet-General Corp.* (1996) 12 Cal.4th 1087, 1093, 1098 (*Mangini II*); *Gehr v. Baker Hughes Oil Field Operations, Inc.* (2008) 165 Cal.App.4th 660, 666-668 (*Gehr*); *Starrh & Starrh Cotton Growers v. Aera Energy LLC* (2007) 153 Cal.App.4th 583, 593-594 (*Starrh*); *Santa Fe Partnership v. ARCO Products Co.* (1996) 46 Cal.App.4th 967, 975; *Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1216-1223 (*Beck*); *Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1142-1145 (*Mangini I*).)

In the most recent of these cases, *Gehr*, our sister court summed up the law very similarly to the way our Supreme Court did decades earlier in *Baker*, stating: "The available remedies and limitations periods for private nuisance claims differ according to whether the nuisance is classified as continuing or permanent. [Citation.] If the nuisance has inflicted a permanent injury on the land, the plaintiff generally must bring a single lawsuit for all past, present, and future damages within three years of the creation of the nuisance. [Citations.] But if the nuisance is one ' "which may be discontinued at any time, it is considered continuing in character and persons harmed by it may bring successive actions for damages until the nuisance is abated. [Citation.] Recovery is limited, however, to actual injury suffered prior to commencement of each action. Prospective damages are unavailable." [Citation.]' [Citation.] This means that if a private nuisance is deemed to be a continuing nuisance, the plaintiff may bring successive

[4] Appellants quote a sentence from *Baker* to the effect that "we should be particularly cautious not to enlarge the category of permanent nuisances beyond those structures or conditions that are truly permanent." (*Baker, supra,* 39 Cal.3d at pp. 872.) True enough, but (1) that case involved airport noise which the plaintiffs "elected to treat . . . as a continuing nuisance" (*id.* at p. 873), not a decades-old almost 200-foot constantly-sloughing old quarry cliff and (2) more importantly, as will be noted below, all of this is a fact question which should be—and was here—decided by a finder of fact, i.e., the jury.

actions for damages (except for diminution in value) incurred prior to the commencement of each successive action until the nuisance is finally abated." (*Gehr, supra,* 165 Cal.App.4th at pp. 666-667, fn. omitted.)[5]

Further, there was and is clear authority supporting the trial court's "reasonably abatable" terminology. Thus, in *Mangini II,* our Supreme Court approved an instruction to the jury "that plaintiffs must prove 'that whatever they claim constitutes the nuisance is actually and practically abatable by reasonable measures and without unreasonable expense. Theoretically, anything can be removed. But an abatable [] nuisance is one which as a practical matter considering hardship and cost can be removed.'" (*Mangini II, supra,* 12 Cal.4th at p. 1098.) A page later, that court reemphasized this point by approvingly quoting comment f to section 839 of the Restatement of Torts, which read: " 'By an "abatable physical condition" is meant one that reasonable persons would regard as being susceptible of abatement by reasonable means. The law does not require the unreasonable or fantastic, and therefore even though it might conceivably be possible to abate a particular condition, it is not "abatable" within the meaning of this Section unless its abatement can be accomplished without unreasonable hardship or expense.' " (*Mangini II, supra,* 12 Cal.4th at p. 1299, quoting Rest.2d Torts, § 389, com. f, p. 162; see also *Spaulding, supra,* 38 Cal.2d at pp. 267-268.)

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[5] Appellants rely heavily on a decision of our colleagues in the Sixth District in attempting to contravene this clear, indeed almost overwhelming, authority. That decision is *Capogeannis v. Superior Court* (1993) 12 Cal.App.4th 668, where the appellate court reversed a summary judgment granted by the trial court against the plaintiff-current owners of real property and in favor the defendants, the property's prior owners and their tenant. The appellate court held that the issue of whether the nuisance involved (there, contamination by the leakage of toxic waste) was "permanent" or "continuing" was a question of fact, not one of law, and that the trial court erred in not allowing the plaintiffs to proceed on a theory of "continuing nuisance" because of the undisputed evidence in record "that the condition in this case [fuel tank leakage] continues to cause harm." (*Id.* at p. 681.) As a result, the court held, "the question whether this was a permanent or a continuing nuisance was so close or doubtful as to empower the [plaintiffs] to proceed on a theory of continuing nuisance." (*Id.* at p. 682.) Here, unlike *Capogeannis,* a jury was allowed to and did decide that question of fact.

In the case before us, the jury voted—apparently unanimously—that the nuisance involved here, i.e., the falling rock, was not "reasonably abatable." As a consequence, the nuisance was and is a "permanent nuisance" under the authorities just cited.

The evidence adduced before the court made clear that the appellant HOA's board was aware of the rockslides constituting the nuisance as early as March 1996. As a consequence, its February 2003 action—as well as the other individual actions—were barred by the three-year statute of limitations of section 338(b). This is so because, as our Supreme Court wrote in *Baker*: "In such cases, plaintiffs ordinarily are required to bring one action for all past, present and future damage within three years after the permanent nuisance is erected." (*Baker, supra,* 39 Cal.3d at p. 869; see also *Beck, supra,* 44 Cal.App.4th at pp. 1216-1217; *Mangini I, supra,* 230 Cal.App.3d at pp. 1142-1145.)

There was clearly substantial evidence supporting the "not reasonably abatable" special verdict. Specifically, a July 1996 "Final Subdivision Public Report" prepared by the California Department of Real Estate, and given to all buyers of Stoneridge condominiums contained, under the heading "HAZARDS" the following sentence: "The project is located on an old rock quarry site, owners should expect falling rocks from time to time." Consistent with that warning, rockslides were regularly reported, particularly at Buildings 5000 and 6000, at appellant HOA's Board meetings in 1996, 1997, and 1998. As noted above, in 1998, that Board hired Herzog to determine how to abate the problem. His determinations probably constitute the most determinative of the many items of substantial evidence in support of the jury's "permanent" determination. For example, Herzog made clear that a fence would definitely not solve the problem but, rather, such a solution would require "massive remedial measures including extensive tiebacks or rock bolting in conjunction with steel net facing." Indeed, such was the position take by appellants at the trial: a fence wasn't good enough, they argued, because it "could overwhelm the fence," thus mandating a steel mesh tieback of the rockface or spraying shotcrete over the entire face of the wall. That remedy would require over 15,000 linear feet of steel and 104,000 square feet of netting, and six to nine months of work by two

work crews. The estimated cost of all this was almost $10 million for the "steel mesh option" and over $17 million for the "shotcrete option."

Understandably, the appellant HOA's Board reacted "unfavorably to the Herzog proposal because of its cost" because it was "freeway construction n a group of people who just barely bought brand new homes and were stretched to their limit, and they couldn't imagine paying for anything like that."

In their briefs, appellants essentially attempt to reargue the facts presented to the jury relevant to the issue of whether the nuisance was "permanent" or "continuing." As noted earlier, they first of all argue—contrary to the applicable standard of review—that the evidence supported "the characterization of the nuisance as continuing." (Initial caps omitted.) They then argue that the "testimony and evidence established that, regardless of disputes over the appropriate plan or expense, the subject rock falls are a continuing nuisance that can be abated" and that the jury "could have determined that the condition was reasonably abatable by measures less than the scope and costs suggested by Herzog and Gibson."

But, as noted above, this is contrary to both the testimony of those two critical—as it turned out to respondent, too—experts, who both opined that their two proposed curative methodologies were "the only methods" that could abate the nuisance.

All of this, and much more before the jury, clearly constituted substantial evidence that the nuisance at issue here was not "reasonably abatable" and was, therefore, permanent, with the result that the bar of section 338(b) applied.

B. *The Trial Court did not Abuse its Discretion in Bifurcating the Trial*.

As noted above, the trial court's orders bifurcating the issues to be tried and the order thereof are reviewed for abuse of discretion. (See, e.g., Eisenberg, et al. Cal. Practice Guide, *supra*, ¶ 8:96.10; *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, 1087.)

Perhaps more importantly, appellants themselves originally offered a "proposed trial management plan" which specifically involved a bifurcation, and the trial court approved it in September 2007. Five months later, just before the start of the trial, the

parties conferred both off and then on the record, and both sides then approved the trial court's resolve to bifurcate the coming trial so that "the issues of permanent versus continuing nuisance; the latent/patent issue, which relate to the statute of limitations" should be bifurcated "pursuant to CCP Section 597." After a several-page discussion between the court and all counsel, the court stated that "we'll do [those] first two first and then just see where we are." No objection whatsoever was made by any of appellants' counsel to this proposed bifurcation procedure. The result: those were the issues posed to the jury via the special verdict forms in the first phase of the trial.

As respondent points out in its brief, this issue arose again the following month (March 2008) during a conference on the instructions to be given the already-sworn in and sitting jury. The following dialogue took place between the court and one of the appellant HOA's counsel:

"MR. FINN: Your Honor, just so the record is clear, there may have been a misunderstanding because our focus of the case was that the only issue to be adjudicated was whether this thing – what the nuisance is, is it continuing, does it vary over time, and now with the Court's guidance we're –

"THE COURT: Are you telling me that the issue of reasonable abatement was irrelevant and therefore –

"MR. FINN: No, I'm not suggesting that at all.

"THE COURT: Okay.

"MR. FINN: What I'm getting to is I want to make clear [co-counsel's] point, but that's a damages component. What you have to decide here is can it be abated at reasonable cost, period, end of story.

"If the jury says it's continuing, then we get into whether or not they want to buy the fix and the cost of that fix in the Phase II aspects of the case. That's the only point I wanted to make.

"THE COURT: I think you're just throwing sand into the gears at this point. You all agreed on this. This is the issue.

"Conceivably, if they answer this 'no, it is not reasonably abatable,' then if there are some damages that you think they're still entitled to in light of that, then maybe that's what Phase II would become."

Our review of the record reveals no subsequent objections by appellants to the specific issues being bifurcated, i.e., to the issues posed to the jury in the special verdict forms in the first phase of the trial. Further, in the first phase of the trial, appellants' case was substantially directed to the issue of the reasonableness and feasibility of the abatement plan proffered by engineers Herzog and Gibson. In short, not only was there no abuse of discretion by the trial court in presenting the "latent vs. patent" and "permanent vs. continuing" issues to the jury in the first phase of the trial, precisely that was effectively agreed to by appellants.

Although apparently conceding that the bifurcation suggested by the court on February 27, 2008, was agreed to then and there by their counsel, appellants now argue that the bifurcation order was implemented incorrectly because, pursuant to it, the court permitted respondent to (1) "improperly argue damages in violation" of that order and (2) "improperly allowed the bifurcation order to become corrupted with phase II damage arguments when the jury should have only been required to determine whether the nuisance was reasonably abatable in phase I." We disagree with both contentions. First of all, although respondent argued to the jury that the Herzog/Gibson alternative plans were too expensive and, indeed, cross-examined both experts to that end, our review of the record reveals no objection to either that cross-examination or that argument. Second, bearing in mind that the issue before the jury was whether the nuisance was "reasonably abatable," clearly inherent in the concept of "reasonableness" is the element of cost. And examining witnesses and/or arguing to the jury regarding the costs of remediation of the sorts being proposed by appellants can easily be considered, or at least labeled as, an argument relating to "damages."

C. *The Trial Court did not Abuse its Discretion in Excluding Evidence of the CCSF Notices of Violation.*

Appellants' third claim is that the trial court erred in denying their motion to admit into evidence the four CCSF notices of violation. As noted above, the trial court's ruling, based as it was on Evidence Code section 352, is reviewed for abuse of discretion. (See, e.g., Eisenberg, et al. Cal. Practice Guide, *supra,* ¶ 8:96.4; *Austin B. v. Escondido Union School District* (2007) 149 Cal.App.4th 860, 885; *Akers v. Miller* (1998) 68 Cal.App.4th 1143, 1147.) We find no such abuse here.

In the first place, and as respondent notes (and appellants effectively agree), prior to the trial of this case, an attempted mediation of the issues between the parties had been conducted by CCSF. The apparent goal was to try to achieve a mutually acceptable remediation plan. Appellants, however, moved to exclude evidence of this from the trial.

A few days later, still in the pre-trial/motion in limine stage, respondent moved to exclude the four CCSF notices of violation, arguing that they were irrelevant to the "continuing vs. permanent" issue to be tried to the jury. Appellants' counsel responded, significantly: "I am not disagreeing with that, Your Honor," adding that he just wanted the jury to "know a little bit about the story of what happened here." The trial court ruled that appellants could mention the notices albeit without casting blame; it noted that any other ruling would be the same as allowing admission of evidence of an arrest to prove guilt. Appellants agreed to this approach (ibid.), an approach clearly consistent with the law on this point. (Cf., e.g., *Beck, supra*, 44 Cal.App.4th at pp. 1187-1189.)[6]

There are other reasons why the trial court did not abuse its discretion regarding this evidence. First of all, none of the CCSF notices recited any sort of official determination that there was, in fact, a nuisance, much less that any such nuisance was "continuing" rather than "permanent." Second, even if it had, such a statement—or even

[6] As noted in footnote 5 *ante*, appellants' reliance on *Capogeannis* regarding this evidentiary issue is not at all persuasive because of the very basic difference in the legal holding of that case, i.e., the reversal of a summary judgment where there had been no factual finding—as there specifically was here—as to whether the relevant nuisance was "permanent" or "continuing."

an hint along those lines—would have been excludable as hearsay. (See *People v. Ramos* (1997) 15 Cal.4th 1133, 1177.) Third, and as noted above, the notices—although mostly delivered before the attempted mediation between the parties—were at least partially the focus of that mediation, a fact specifically acknowledged to the trial court by appellants' counsel. Fourth, and finally, any error in the trial court's ruling denying admission of the several CCSF notices could not, in our opinion, have possibly been prejudicial.

D. *The Trial Court did not Abuse its Discretion Regarding the Special Verdict Form.*

Finally, appellants argue that the trial court abused its discretion in the manner in which it phrased the special verdict form. That form posed this question to the jury: "Is the nuisance complained of by the Plaintiffs reasonably abatable according to the proposed plan of abatement offered by Mr. Gibson and Mr. Herzog?"

Appellants contend that this question was unduly restrictive, and that their proposed, alternative special verdict question was what the court should have posed to the jury; it was: "Can this nuisance be substantially abated in a reasonably foreseeable manner and at a reasonable cost." In their briefs to us, appellants argue that the phrasing of the special verdict form prevented the jury from considering "whether the nuisance could be abated in a reasonable manner and at a reasonable cost and is feasible by comparison of the benefits to be gained and detriment to be avoided by abatement."

The problem is that, at trial, appellants argued specifically that the Herzog-Gibson "rock-bolting" or "mesh" plan was "the way to essentially eliminate that risk of rock falling" and "the only way" to abate the nuisance. Expert Gibson testified exactly to this effect, too, as he confirmed that his and Herzog's method were "the only methods [he was aware of] that could possibly stabilize this hill." This position was again articulated in appellants' closing arguments to the jury. For example, one of their counsel argued that the Herzog/Gibson plan was "the only reasonable alternative" while the other argued that their "rock-anchor or tieback approach" was "the only feasible method."

Appellants' position at trial was, therefore, 180 degrees opposite of their argument to us now. There and then, it was the Herzog/Gibson plan or nothing; now, it is that the trial court should have asked the jury whether there was a reasonable-cost manner by

which the nuisance could be abated. Appellants cannot have it both ways. In view of the very pointed and specific evidence presented by experts Herzog and Gibson regarding their proposed methodology of abatement and their counsels' arguments to both the trial court and the jury regarding that absolute necessity of that methodology, the special verdict form was both reasonable and proper.

Related to this claim of error is appellants' assertion that the special verdict form "improperly included a question on damages, which should have been reserved for phase II . . . ." This assertion is explained thusly a bit later: "the Court's flawed Verdict Form . . . precluded the jury from determining that a lesser scope or repair was sufficient. The issue of what the scope of repair should be is clearly a question of damages which originally was reserved for phase two of the trial. . . . This was extremely prejudicial to Plaintiffs as it improperly advanced the damages issue into phase one of the trial before Plaintiffs had put on all of their damage evidence regarding the purpose, scope and necessity of their repair plan, clearly to Plaintiffs' detriment."

We disagree with this contention for two separate and independent reasons. The first is that it was appellants who produced the two experts who testified to the substantial costs of the two methods of remediation they proposed and then, as noted above, testified that these methods were the only way to fix the rockslides. Second, testimony about the cost of repair, although possibly also relevant in the phase II part of the trial (which, of course, never took place) is also highly relevant to whether the repair plans proffered by appellants were reasonable, a key question properly posed to the jury. Put another way, and as already noted above, almost by definition the issues of cost and damages both necessarily involve the issue of money; hence, introducing evidence of cost does not mean that the party so doing is improperly arguing damages.

E. *The Trial Court did not Err Regarding its Instructions to the Jury.*

Appellants first contend that the trial court gave an incorrect instruction regarding what constitutes a private nuisance. They had proposed that the court instruct the jury that: "A nuisance is a continuing nuisance when it cannot be abated at a reasonable cost by reasonable means or it is the result of continuing activity or the impact of the

condition varies over time." The trial court rejected that proposed instruction; it concluded that it misstated the law because, principally, its use of the disjunctive "or" misstated the law as articulated in *Mangini II*. It thus gave three instructions on the relevant definitions.

The first one was: "A nuisance is anything which is injurious to health, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property."

The second was: "To establish a continuing nuisance, the plaintiffs must prove, by a preponderance of the evidence:

1. The offensive activity is currently continuing.

2. The impact of the condition will vary overtime [sic: over time].

3. That whatever Stoneridge claims constitutes a nuisance is actually and practically abatable by reasonable measures without unreasonable expense. Theoretically, anything can be abated, but an abatable nuisance is one which, as a practical matter, considering hardship and costs can be prevented."

The third was: "The fundamental considerations in determining reasonable abatability include the feasible means of, and alternatives to, abatement, the time and expense involved, legitimate competing interests, and the benefits and detriments to be gained by abatement or suffered if abatement is denied. In considering the relative benefits and burden of remediation, you must compare the costs of remediation and the actual detriment to the plaintiff from a failure to remediate. In considering whether costs to remediate a nuisance are reasonable, you may consider the costs of remediation versus the value of the land."

Respondent objected to the second instruction, arguing that it was worded more favorably to appellants. Appellants did not object to either the first or third instruction quoted above but, rather, argued only that three tests given in the middle instruction should have been given in the disjunctive, i.e., by the specific use of the term "or," so that the jury could have concluded that, if *any one* of those three facts were true, it *necessarily*

followed that the nuisance was only "continuing" and not "permanent." They continue this disjunctive argument in their briefs to us, citing *Starrh* as supportive.

This argument simply does not work. First of all, the language appellants rely upon in *Starrh* was quoted by that court from a real estate text, and did not concern any sort of instruction to a jury. More importantly, the authority the trial court cited relied upon in phrasing the "reasonably abatable" part of that second instruction (*Mangini II, supra,* 12 Cal.4th at p. 1098) clearly established that this wording was not only permissible but necessary.[7] Put another way, if appellants' argument to us is correct, the jury could and should have found the nuisance to be legally "continuing" because, and *only because*, "the offensive activity is currently continuing." This is not and cannot be the law; as a result, the trial court properly instructed the jury on the factors it should consider in determining whether the nuisance involved here was "continuing" or "permanent."

Appellants only other complaint regarding the trial court's instructions arises from a combination of (1) the trial court's refusal to give an instruction to the jury regarding payment of the costs of repair and (2) respondent's counsel's subsequent argument to the jury that it would be a "hardship" on the respondent's homeowners if they were required to pay the costs of abatement. We also reject this claim.

The instruction appellants requested and the court declined to give read: "You must not consider who will pay for the cost of repair for abatement of the nuisance. Who will pay for the cost of repair for abatement of the nuisance is totally irrelevant. You must decide whether there is a continuing nuisance only on the law and the evidence." Appellants' counsel contended that this instruction was appropriate because of prior testimony by the respondent's president regarding the ability of those homeowners to pay for the costs of repair.

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[7] Nothing in the holding in *Starrh* is to the contrary. Nor could it be inasmuch as it was a Court of Appeal opinion issued subsequent to our Supreme Court's holding in *Mangini II*. More importantly, the *Starrh* court expressly cited and relied upon *Mangini II*. (See *Starrh, supra,* 153 Cal.App.4th at pp. 593-595.)

The trial court rejected this instruction because, it reminded appellants' counsel during the discussion of the proposed instruction, it had sustained an objection by him to a question posed by respondent HOA's counsel to the same witness as to whether that HOA's owners were "a wealthy group with a lot of equity in their" property. Appellant's counsel contended that, notwithstanding the sustaining of this objection, the court had not stricken "all of the testimony that related to the homeowners' purported ability [to pay for repairs]." The court flatly stated that no such motion had been made or denied, and neither then nor now do appellants cite any place in the record where there was either (1) a denial of a motion to strike such testimony or (2) a motion by appellants for the court to admonish the jury on this subject. This claim of error is, therefore, waived.

Appellants claim that, notwithstanding the denial of this proposed instruction, respondent's counsel was allowed to argue to the jury that "it was unfair to force [respondent] Saddleback to pay the entire amount of the Herzog/Gibson repair" and that the jury "clearly rendered its decision on [that] basis." This argument is simply not sustained by our examination of the record. It establishes that respondent's counsel's argument to the jury on this point was, essentially, that what the plaintiffs were seeking was simply not "reasonable abatement" but something far more costly than that.

F. *The Homeowners Emotional Distress Claims were Properly Dismissed as Untimely.*

Finally, the individual appellants claim that their "personal injury claims"are not barred because they are subject to the two-year statute of limitations set forth in Code of Civil Procedure section 335.1 (section 335.1). We disagree.

The operative complaint of the individual appellants, the second amended complaint filed in October 2007, alleged two causes of action only; both were for "Private Nuisance." Only the second cause of action was against respondent; it was a clear allegation of a basic nuisance cause of action, alleging both directly and incorporation by reference from earlier allegations, interference "with Plaintiffs' use and private enjoyment of the Subject Property, namely by failing to maintain their property to prevent and/or by failing to take adequate precaution and/or preparation to prevent rockfalls from entering onto Plaintiffs' property." As, clearly, subsidiary allegations,

once directly and once by incorporation, the individual plaintiffs alleged that "[d]efendants' conduct has caused and continues to cause the individuals to suffer serious emotional distress."

Even if appropriate in private nuisance actions (as to which, see *ante*), such allegations do not lift the operative complaint out of the three-year statute of limitations of section 338(b) and into the two-year statute of section 335.1. The former covers actions "for trespass upon and injury to real property," and has been repeatedly interpreted to cover nuisance causes of action, more specifically nuisances alleged to be (or, as here, found by a jury to be) permanent in character. (See, e.g., *Shamsian v. Atlantic Richfield Co.* (2003) 107 Cal.App.4th 967, 979; *KFC Western, Inc. v. Meghrig* (1994) 23 Cal.App.4th 1167, 1180-1181; *Wilshire Westwood Associates v. Atlantic Richfield Co.* (1993) 20 Cal.App.4th 732, 744.) The latter covers actions for "assault, battery, or injury to . . . an individual caused by the wrongful act or neglect of another." (Section 335.1.) In no way, shape or form was that the action pled by these appellants in October 2007; contrary to appellants' characterizations of this cause of action, it was distinctly *not* one for "their personal injury claims."[8]

The appellate decisions are in conflict as to whether emotional distress claims may even be asserted in private nuisance actions. Suggesting in the affirmative are: *Acadia, California, Ltd. v. Herbert* (1960) 54 Cal.2d 328, 337-338; *Herzog v. Grosso* (1953) 41 Cal.2d 219, 225-226. But these other cases hold they may not: *Institoris v. City of Los Angeles* (1989) 210 Cal.App.3d 10, 21; *Venuto v. Owens-Corning Fiberglas Corp.* (1971) 22 Cal.App.3d 116, 124-125. But even if emotional distress claims may be pled as an element of damage in a private nuisance action, such emotional distress "must be *caused*

[8] The case appellants rely on principally in support of their argument that section 335.1 applies here was a personal injury action filed by a customer of a department store, who claimed she was injured when she tripped "on a metal rack that had been left on the floor" of that store. (*Andonagui v. May Dept. Stores Co.* (2005) 128 Cal.App.4th 435, 438.) That case is not remotely pertinent regarding the statute of limitations applicable to these individual appellants' private nuisance claims.

by an interference with a specific property right . . . ." (*Koll-Irvine Center Property Owners Assn. v. County of Orange* (1994) 24 Cal.App.4th 1036, 1042, fn. 3.)

Giving appellants the benefit of the doubt on this point, and assuming emotional distress damages *are* recoverable in a private nuisance action, clearly the pleading of such damage cannot and does not alter the applicable the statute of limitations. The trial court was thus correct in its ruling that the individual plaintiffs' emotional distress damage claims, all pled as incidental to their "private nuisance" causes of action, were also barred by the applicable statute of limitations, section 338(b).

IV. DISPOSITION

The judgment is affirmed.

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Haerle, Acting P.J.

We concur:

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Lambden, J.

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Richman, J.